

United States
Circuit Court of Appeals
For the Ninth Circuit.

HONG CHOW DUCK,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

FILED

FEB 17 1923

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

HONG CHOW DUCK,

Appellant,

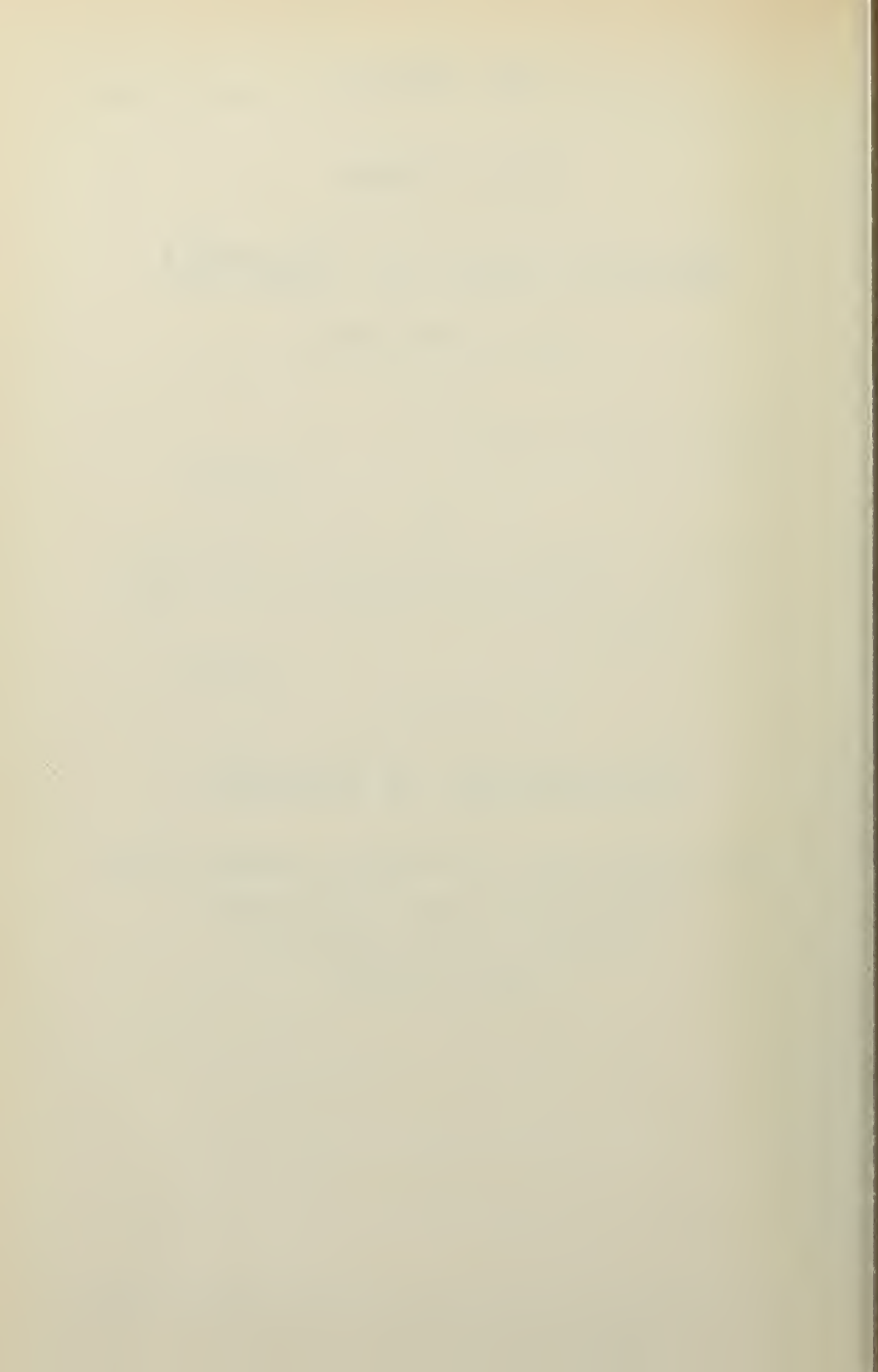
vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

For Petitioner and Appellant:

JOHN L. McNAB, Esq., BERT SCHLES-
INGER, Esq., and S. C. WRIGHT, Esq.,
Crocker First National Bank Bldg., San
Francisco, Calif.

For Respondent and Appellee:

U. S. ATTORNEY, San Francisco, Califor-
nia.

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Second Division.

No. 19,501.

In the Matter of HONG CHOW DUCK, for a
Writ of Habeas Corpus.

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please make transcript of appeal in the
above-entitled case, to be composed of the follow-
ing papers, to wit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer.
4. Minute order introducing immigration record
at the hearing on demurrer; and stipula-

tion that the immigration record in the case of Hong Chow Duck is to be admitted and considered a part of his petition for writ of habeas corpus.

5. Judgment and order sustaining demurrer and denying petition.
6. Notice of appeal.
7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.
10. Citation on appeal.
11. Order transmitting original exhibits.
12. Admission of service.
13. Cost bond.
14. Clerk's certificate.

Dated: December 30, 1927. [1*]

JOHN L. McNAB,
BERT SCHLESINGER,
S. C. WRIGHT,

Attorneys for Petitioner and Appellant Herein.

[Endorsed]: Service of the within praecipe by receipt of a copy thereof is admitted this 30th day of December, 1927.

GEO. J. HATFIELD,
U. S. District Attorney.

Filed Dec. 30, 1927. [2]

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the Southern Division of the District Court of the United States, for the Northern District of California.

No. 19,501.

In the Matter of HONG CHOW DUCK, for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS
CORPUS.

To Honorable F. H. KERRIGAN, Judge of the Southern Division of the District Court of the United States, for the Northern District of California,

The petition of Hong Chow Duck, respectfully shows:

That he, the said Hong Chow Duck, is unlawfully imprisoned, detained and restrained of his liberty, at Angel Island, State and District aforesaid, by Hon. John D. Nagle, United States Commissioner of Immigration at the port of San Francisco, State and Northern District of California.

That said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That on or about the 25th day of March, 1924, the United States Commissioner of Immigration at the port of San Francisco after a very careful examination and hearing found and determined that the said petitioner, Hong Chow Duck, was entitled to land, and he was admitted into the United

States of America, as the son of Hong Kun, a merchant and a member of the firm of Sam Hing & Company, dealers in groceries and provisions at No. 1040 Grant Avenue, in the city and county of San Francisco.

Petitioner avers that said firm was organized in the year 1917, and his father, Hong Kun, was one of the [3] original members of said firm, and ever since said date has continued to be, and still is a member of Sam Hing & Company; that said firm has, during the ten years of its existence, continued to occupy its present location at 1040 Grant Avenue, San Francisco, and has, during all that time been actively engaged in the sale of groceries and provisions, doing a business of about \$70,000.00 a year.

That petitioner's father, Hong Kun, was an active member of said firm from 1917 until the present time, with the exception that the firm classed him as an inactive member and he did not receive a salary from the time he left for China in December, 1919, until he returned from China in January, 1921, but for all the other years Hong Kun received and still receives a salary from said firm. That during the years 1922 and 1923 said salary was \$50.00 per month, and this is disclosed by the books of the Sam Hing Company, and by the returns of that company to the Treasury Department as shown by copies of those returns in the files of the Sam Hing Company, and by a letter from an official of the Department of the Treasury

of the United States addressed to the Sam Hing Company.

That the books of said firm and the Income Tax Returns both show that petitioner's father, Hong Kun, is an active member of the firm of Sam Hing & Company.

That petitioner's father, Hong Kun, has been continuously in the United States for more than 45 years with the exception that he made five trips to China. On the last trip to China, he left in December, 1919, and returned in January, 1921. During this period of practically half a century, he has been and is a peaceable and law-abiding resident of the United States. [4]

That after petitioner was admitted into the United States his father caused him to be sent to the Presbyterian school in San Francisco to study and learn English so as to fit him for trade in this country; that petitioner now speaks some English, and has acquired an interest in the Canton Bazaar, 616 Grant Avenue, San Francisco, California, dealers in Chinese and Japanese curios, and works of art; that said Bazaar carries a stock of merchandise of the value of \$75,000.00, or thereabouts; that petitioner also receives a salary of \$50.00 a month from said Bazaar.

That approximately three years after petitioner had been landed by order of the United States Commissioner of Immigration at the port of San Francisco, petitioner was arrested under a warrant of deportation issued by the Department of

Commerce and Labor, and charged with being illegally in the United States.

That after petitioner's arrest testimony was taken before one of the inspectors connected with the immigration service at San Francisco, and the testimony and record in said matter was forwarded to the Secretary of Commerce and Labor at Washington, D. C.

That said Secretary has refused to revoke the warrant of deportation, and unless this Court intervenes petitioner will be deported to China.

That the Secretary of Commerce and Labor was without authority or jurisdiction to issue said warrant, or direct the deportation of petitioner, for that no substantial evidence, or any legal evidence or proof to sustain the charge made in the original warrant, or the finding in the order of deportation, had been submitted to the said Secretary, and without such proof the said proceeding and warrant were void and of no legal effect.

That petitioner did not have a fair and impartial trial before the Department of Commerce and Labor in this: [5]

The evidence and proceedings before said Secretary of Labor indisputably showed that on or about the 3d day of January, 1924, petitioner arrived at the port of San Francisco from China, and sought to be landed as the son of Hong Kun, a merchant, and member of the firm of Sam Hing & Company. On March 21, 1924, petitioner, his father and witnesses appeared before a Special Board of Inquiry of the United States, at San

Francisco, and after a most thorough investigation and hearing the said Board found that Hong Kun was a merchant and had been for more than one year prior to the entry of petitioner, and that petitioner, Hong Chow Duck, was entitled to enter the United States as the minor son of Hong Kun, a merchant, and petitioner did enter, and was not molested until his arrest on a warrant of deportation issued by the Secretary of Labor nearly three years thereafter.

Some time after petitioner was admitted into the United States, Hong Kun brought to the United States Hong Chow Jung, another son, and brother of petitioner; thereafter Hong Kun, petitioner, Louie Hoy, and others, were indicted and charged with having entered into a conspiracy to bring into the United States petitioner as a son of a merchant, whereas the indictment alleged that petitioner was then and there the son of a laborer.

An indictment was also returned against Hong Kun, Hong Chow Jung, and others, charging a similar offense, and a *nolle prosequi* was entered by the Government against Hong Chow Jung. A trial was had on the indictment in which petitioner was named as a defendant, and the sole issue under the indictment, presented to the jury under the charge of the Court and passed upon by the jury, was resolved into one question as to whether Hong Kun was a merchant, or whether he was a laborer at and for one year prior to the time petitioner, his son, entered the United States. [6]

The jury brought in a verdict of not guilty; that such verdict was and is a finding that Hong Kun was a merchant and was not a laborer.

That the Secretary of Labor refused to consider the finding of the jury as entitled to any weight as to the mercantile status of Hong Kun.

That the finding of the Secretary of Labor was and is unfair, and amounts to an abuse of discretion in this: that no substantial or any evidence in said proceeding was adduced before him that negatives the showing made by Hong Kun that he was a merchant and a member of the firm of Sam Hing & Company for one year next preceding the entry of petitioner into the United States, and that he did not perform any manual labor except that which was incident to his occupation as such merchant; and therefore petitioner was lawfully admitted into the United States and entitled to remain therein.

That the said Secretary of Labor ignored and disregarded the evidence adduced by petitioner which without conflict shows that petitioner's father, Hong Kun, was a merchant for more than one year preceding the entry of petitioner into the United States, and performed no manual labor during that time which destroyed his status as a merchant.

That the examination taken by the inspector, upon which the findings of the Secretary of Labor are based, fails to disclose a violation of any of the provisions or prohibitions of the Immigration Act, or the Chinese Exclusion Act.

That no prior application has been made for a writ of habeas corpus in regard to the detention or restraint complained of in this application.

WHEREFORE, petitioner prays that a writ of habeas corpus may be granted, directed to the said Hon. John D. Nagle, United States Commissioner of Immigration at the port of San Francisco, and stationed at Angel Island, in the State and [7] District aforesaid, commanding him to have the body of said Hong Chow Duck before your Honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your Honor concerning the said Hong Chow Duck, together with the time and cause of his detention, and said writ; and that he, the said Hong Chow Duck, may be restored to his liberty and permitted to be and remain in the United States of America.

Dated: November 12th, 1927.

HONG CHOW DUCK,
Petitioner.

JOHN L. McNAB,
BERT SCHLESINGER,
S. C. WRIGHT,

Attorneys for Petitioner. [8]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Hong Chow Duck, being first duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition,

said Hong Chow Duck for a writ of habeas corpus should not be granted, and the said petitioner restored to his liberty and permitted to be and remain in the United States of America.

AND FURTHER ORDERED that the said Hong Chow Duck be and he is admitted to bail in the sum of \$3,000.00, pending the determination of this order to show cause, and the further order of this court.

Dated: November 12th, 1927.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Nov. 12, 1927. [10]

[Title of Court and Cause.]

DEMURRER TO PETITION FOR WRIT OF
HABEAS CORPUS.

Comes now the respondent, John D. Nagle, Commissioner of Immigration at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges;

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the state-

ments therein relative to the record of the testimony taken on the hearing of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

GEO. J. HATFIELD.

By R. M. LYMAN, Jr.,
United States Attorney,
Attorney for Respondent.

[Endorsed]: Filed Dec. 22, 1927. [11]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 22d day of December, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—DECEMBER 22, 1927—
ORDER SUSTAINING DEMURRER, DENYING PETITION FOR WRIT AND STAYING EXECUTION.

This matter came on for hearing on order to show cause as to issuance of a writ of habeas corpus herein. R. M. Lyman, Jr., Esq., Asst. U. S. Atty., was present for and on behalf of United States,

and filed demurrer to petition for writ and also presented the Immigration Records, and all parties consenting thereto, the Court ordered that said records be considered as part of original petition. After arguments of counsel, the Court ordered demurrer sustained and petition for writ denied accordingly, to which order Mr. Wright entered exception on behalf of petitioner and detained. On motion of Mr. Wright, further ordered execution of aforesaid order be stayed for period of 5 days.
[12]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, and to the Honorable GEO. J. HATFIELD, United States Attorney for the Northern District of California:

You, and each of you, will please take notice that Hong Chow Duck, the petitioner and the detained above named, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment made and entered herein on the 22d day of December, 1927, sustaining the demurrer to and in denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, December 28,
1927.

JOHN L. McNAB,
BERT SCHLESINGER,
S. C. WRIGHT,

Attorneys for Petitioner and Appellant Herein.

[Endorsed]: Filed Dec. 27, 1927. [13]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes Hong Chow Duck, the petitioner and appellant herein, and says:

That on the 22d day of December, 1927, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus as prayed for, on file herein, in which said order in the above-entitled case certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled case, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals; and further, that

the said detained be held within the jurisdiction of this court during the pendency of the appeal herein so that he may be produced in execution of whatever judgment may be finally entered herein, or that he be released on bail in the sum of Three Thousand (\$3,000.00) Dollars pending the final determination herein. [14]

Dated at San Francisco, California, December 28, 1927.

JOHN L. McNAB,
BERT SCHLESINGER,
S. C. WRIGHT,

Attorneys for Petitioner and Appellant Herein.

[Endorsed]: Filed Dec. 27, 1927. [15]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Hong Chow Duck by his attorneys, John L. McNab, Esq., Bert Schlesinger, Esq., and S. C. Wright, Esq., in connection with the petition for an appeal herein, assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

First. That the Court erred in denying the petition for a writ of habeas corpus herein.

Second. That the Court erred in holding that it

had no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

Third. That the Court erred in sustaining the demurrer and in denying the petition for habeas corpus herein and remanding the *petition* to the custody of the immigration authorities for deportation.

Fourth. That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of the petitioner from custody as prayed for in said [16] petition.

Fifth. That the judgment made and entered herein is contrary to law.

Sixth. That the judgment made and entered herein is not supported by the evidence.

Seventh. That the judgment made and entered herein is contrary to the evidence.

Eighth. That the evidence indisputably shows the petitioner Hong Chow Duck to be the son of a merchant.

Ninth. That the evidence indisputably shows that Hong Kun, the father of said petitioner, was a *bona fide* merchant in the city and county of San Francisco, State of California, doing business at a fixed place of business and that he had not for more than one year prior to January 3, 1924, performed any manual labor whatever except what was incident to his business as a merchant.

Tenth. That the evidence indisputably shows that the said Hong Kun for more than one year next preceding March 24, 1924, was a *bona fide* Chinese merchant doing business in the city and county of San Francisco, State of California, at a fixed place of business, and that he had not performed any manual labor except what was incident to his business as such merchant for one year immediately prior to the 25th day of March, 1924.

Eleventh. That the evidence indisputably shows that the said Hong Kun had not performed any manual labor except what was incident to his business as a merchant within one year immediately preceding the entry of petitioner into the United States.

Twelfth. That the appellant was denied a fair hearing by the Immigration authorities. [17]

WHEREFORE, the appellant prays that the judgment and order of the Southern Division of the United States District Court for the Northern District of the State of California, Second Division, made and entered herein in the office of the Clerk of the said court on the 22d day of December, 1927, discharging the order to show cause, sustaining the demurrer and in denying the petition for a writ of habeas corpus, be reversed, and that this cause be remitted to the said lower court with instructions to issue the writ of habeas corpus, as prayed for in said petition.

Dated at San Francisco, California, December 28, 1927.

JOHN L. McNAB,
BERT SCHLESINGER,
S. C. WRIGHT,

Attorneys for Petitioner and Appellant Herein.

[Endorsed]: Filed Dec. 27, 1927. [18]

[Title of Court and Cause.]

ORDER ALLOWING PETITION FOR
APPEAL.

On this 27th day of December, 1927, the detained herein, Hong Chow Duck, comes by his attorneys John L. McNab, Esq., Bert Schlesinger, Esq., and S. C. Wright, Esq., and having previously filed herein, did present to this Court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intending to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated may be sent and transmitted to the United States Circuit Court of Appeals, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court allows the appeal hereby prayed for and orders execution and remand stayed pending the hearing

of the said case in the said United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that the respondent herein retain the said detained within the jurisdiction of this court and that he be not deported, or permitted to depart, from the jurisdiction of this court, but remain and abide by whatever judgment may be finally rendered herein; and that appellant may be released [19] on bail in the sum of \$3,000.

Dated at San Francisco, California, December 28, 1927.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Dec. 27, 1927. [20]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

It appearing to the Court that the original Immigration Records appertaining to the application of Hong Chow Duck, the detained herein, to enter the United States were introduced in evidence before and considered by the lower court in reaching its determination herein, and it appearing that said records are a necessary and proper exhibit for the determination of said case upon appeal to the United States Circuit Court of Appeals:

IT IS NOW, THEREFORE, ORDERED, upon motion of John L. McNab, Esq., Bert Schlesinger,

Esq., and S. C. Wright, Esq., attorneys for the detained herein, that the said Immigration Records may be withdrawn from the office of the Clerk of the court and filed by the Clerk of this court in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial District, said withdrawal to be made at the time the record on appeal herein is certified to by the Clerk of this court.

Dated San Francisco, California, December 28, 1927.

ST. SURE,
United States District Judge.

[Endorsed]: Filed Dec. 28, 1927. [21]

[Title of Court and Cause.]

ADMISSION OF SERVICE.

Service of the notice of appeal, petition for appeal, assignment of errors, order allowing appeal and citation on appeal, by receipt of copies thereof, is admitted this 28th day of December, 1927.

GEO. J. HATFIELD,
United States Attorney.

[Endorsed]: Filed Dec. 28, 1927. [22]

BOND FOR COSTS.

KNOW ALL MEN BY THESES PRESENTS, That we, Hong Chew Duck, as principal, and National Surety Company, as sureties, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty Dollars, to be paid to the said United States of America, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of December in the year of our Lord one thousand nine hundred and twenty-seven.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said court, in the matter of Hong Chew Duck for a writ of habeas corpus a judgment was rendered against the said Hong Chow Duck and the said Hong Chow Duck having obtained from said court an order allowing an appeal to reverse the judgment in the aforesaid suit, and a citation directed to John D. Nagle as Commissioner of Immigration at the port of San Francisco citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California

Now, the condition of the above obligation is such, That if the said Hong Chow Duck shall prosecute

his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HONG CHEW DUCK,
616 Grant Avenue. [23]
NATIONAL SURETY COMPANY,
[Seal] By JOHN R. MOORE,
Its Attorney-in-fact.

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
U. S. Commissioner, Northern District of California, at S. F.

[Endorsed]: Filed Dec. 28, 1927. [24]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 24 pages, numbered from 1 to 24, inclusive, contain a full, true and correct transcript of the records and proceedings in the Matter of Hong Chow Duck, on Habeas Corpus, No. 19,501, as the same now remain on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on Appeal is the sum of nine dollars and seventy cents (\$9.70), and

that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 2d day of February, A. D. 1928.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [25]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to John D. Nagle, Commissioner of Immigration, Port of San Francisco, California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Hong Chow Duck is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not

be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, this 28 day of December, A. D. 1927.

A. F. ST. SURE,
United States District Judge. [26]

[Endorsed]: Filed Dec. 28, 1927.

[Endorsed]: No. 5378. United States Circuit Court of Appeals for the Ninth Circuit. Hong Chow Duck, Appellant, vs. John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed February 2, 1928.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.